

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Feb 09, 2022

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JIM G.,

Plaintiff,

v.

KILOLO KIJAKAZI,
ACTING COMMISSIONER OF
SOCIAL SECURITY,¹

Defendant.

No. 1:20-CV-03130-JAG

ORDER GRANTING IN PART
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT AND
REMANDING FOR ADDITIONAL
PROCEEDINGS

BEFORE THE COURT are cross-motions for summary judgment. ECF No. 16, 17. Attorney D. James Tree represents Jim G. (Plaintiff); Special Assistant United States Attorney Erin Highland represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 6. After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS IN PART** Plaintiff's Motion for Summary Judgment; **DENIES** Defendant's Motion for Summary Judgment; and **REMANDS** the matter to the Commissioner for additional proceedings pursuant to 42 U.S.C. § 405(g).

¹ Kilolo Kijakazi became the Acting Commissioner of Social Security on July 9, 2021. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Kilolo Kijakazi is substituted for Andrew M. Saul as the defendant in this suit. No further action need be taken to continue this suit. *See* 42 U.S.C. § 405(g).

JURISDICTION

Plaintiff filed an application for Supplemental Security Income on March 31, 2014, alleging disability since September 5, 2009, due to irregular heartbeat, depression, lower back pain, chronic migraines, knee pain, and Hepatitis A. Tr. 103. The application was denied initially and upon reconsideration. Tr. 135-42, 146-51. Administrative Law Judge (ALJ) Keith Allred held a hearing on January 10, 2017, Tr. 45-75, and issued an unfavorable decision on March 24, 2017, Tr. 17-37. Plaintiff requested review of the ALJ's decision from the Appeals Council and the Appeals Council denied the request for review on March 29, 2018. Tr. 1-5. Plaintiff filed a civil action in this Court and on May 24, 2018, the claim was remanded for further proceedings. Tr. 1085-1102.

On April 21, 2020, ALJ Chris Stuber held a remand hearing. Tr. 1021-48. On May 28, 2020 ALJ Stuber issued a partially favorable decision, finding Plaintiff was not disabled prior to February 2, 2020, but became disabled on that date, based on his changed age category. Tr. 987-1012. Plaintiff did not file written exceptions with the Appeals Council and the Appeals Council did not review the decision; the ALJ's May 2020 decision therefore is the final decision of the Commissioner, which is appealable to the district court pursuant to 42 U.S.C. § 405(g). Tr. 984. Plaintiff filed this action for judicial review on August 20, 2020. ECF No. 1.

STATEMENT OF FACTS

Plaintiff was born in 1965 and was 49 years old when he filed his application. Tr. 103. He has a high school education and a limited work history with a series of temporary jobs. Tr. 53-54, 244, 645. He has struggled with mental health problems and substance use since he was a young child. Tr. 643-44, 1396. He testified at his hearing that he was unable to work due to a combination of his physical problems and his mental health. Tr. 1030-35, 1039.

STANDARD OF REVIEW

The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed *de novo*, with deference to a reasonable interpretation of the applicable statutes. *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is not supported by substantial evidence or if it is based on legal error. *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put another way, substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational interpretation, the Court may not substitute its judgment for that of the ALJ. *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999). If substantial evidence supports the administrative findings, or if conflicting evidence supports a finding of either disability or non-disability, the ALJ's determination is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987). Nevertheless, a decision supported by substantial evidence will be set aside if the proper legal standards were not applied in weighing the evidence and making the decision. *Browner v. Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

SEQUENTIAL EVALUATION PROCESS

The Commissioner has established a five-step sequential evaluation process for determining whether a person is disabled. 20 C.F.R. § 416.920(a); *Bowen v. Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one through four the claimant bears the burden of establishing a prima facie case of disability. *Tackett*, 180 F.3d at 1098-1099. This burden is met once a claimant establishes that a physical or mental impairment prevents the claimant from engaging in past relevant work. 20

1 C.F.R. § 416.920(a)(4). If a claimant cannot perform past relevant work, the ALJ
 2 proceeds to step five, and the burden shifts to the Commissioner to show (1) the
 3 claimant can make an adjustment to other work; and (2) the claimant can perform
 4 specific jobs that exist in the national economy. *Batson v. Commissioner of Social*
 5 *Sec. Admin.*, 359 F.3d 1190, 1193-1194 (9th Cir. 2004). If a claimant cannot make
 6 an adjustment to other work in the national economy, the claimant will be found
 7 disabled. 20 C.F.R. § 416.920(a)(4)(v).

8 “A finding of ‘disabled’ under the five-step inquiry does not automatically
 9 qualify a claimant for disability benefits.” *Parra v. Astrue*, 481 F.3d 742, 746 (9th
 10 Cir. 2007) (citing *Bustamante v. Massanari*, 262 F.3d 949, 954 (9th Cir. 2001)).
 11 When there is medical evidence of drug or alcohol addiction (DAA), the ALJ must
 12 determine whether the drug or alcohol addiction is a material factor contributing to
 13 the disability. 20 C.F.R. § 416.935(a). In order to determine whether DAA is a
 14 material factor contributing to the disability, the ALJ must evaluate which of the
 15 physical and mental limitations would remain if the claimant stopped using drugs
 16 or alcohol, then determine whether any or all of the remaining limitations would be
 17 disabling. 20 C.F.R. § 416.935(b)(2). If the remaining limitations would not be
 18 disabling, DAA is a material contributing factor to the determination of
 19 disability. *Id.* If the remaining limitations would be disabling, the claimant is
 20 disabled independent of the DAA and the addiction is not a material contributing
 21 factor to disability. *Id.* The claimant has the burden of showing that DAA is not a
 22 material contributing factor to disability. *See Parra*, 481 F.3d at 748.

23 ADMINISTRATIVE DECISION

24 On May 28, 2020, the ALJ issued a decision finding Plaintiff was not
 25 disabled as defined in the Social Security Act prior to February 2, 2020 but became
 26 disabled on that date. Tr. 987-1012.

27 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
 28 activity since the application date. Tr. 990.

1 At step two, the ALJ determined Plaintiff had the following severe
2 impairments: polysubstance abuse, major depressive disorder, posttraumatic stress
3 disorder, degenerative joint disease of the left knee, atrial fibrillation, lumbar and
4 cervical radiculopathy, and obesity. *Id.*

5 At step three, the ALJ found Plaintiff's impairments, including the substance
6 use disorder, met sections 12.04 and 12.06 of 20 C.F.R. Part 404, Subpart P,
7 Appendix 1. Tr. 991-92.

8 Because of Plaintiff's substance abuse, the ALJ further considered his
9 abilities if he were to stop using drugs and alcohol. Tr. 992. The ALJ found
10 Plaintiff's remaining impairment would continue to be severe, but would not meet
11 or medically equal a listing. Tr. 992-94.

12 The ALJ assessed Plaintiff's Residual Functional Capacity (RFC) in the
13 absence of substance abuse and found he could perform a range of light work, with
14 the following limitations:

15 He can occasionally climb ramps and stairs, balance, stoop, kneel,
16 crouch but never climb ladders, ropes or scaffolds or crawl. He should
17 have no exposure to excessive vibrations, hazards, unprotected heights
18 or irritants such as fumes, odors, dust, gases, and poorly ventilated
19 areas. He can understand, remember, and carry out simple instructions,
20 respond appropriately to supervision, coworkers and usual work
21 situations, and he can deal with changes in a routine work setting. He
22 can have occasional interaction with the general public and no more
23 than frequent interaction with coworkers and supervisors.

24 Tr. 995.

25 At step four, the ALJ found Plaintiff had no past relevant work. Tr. 1010.

26 At step five, the ALJ found that, considering Plaintiff's age, education, work
27 experience and residual functional capacity were he to stop substance use, Plaintiff
28 could perform jobs that existed in significant numbers in the national economy,

1 specifically identifying the representative occupations of housekeeping cleaner,
2 cafeteria attendant, and small parts assembler. Tr. 1010-11.

3 As of February 2, 2020, Plaintiff's age category changed to "advanced age."
4 The ALJ applied the medical vocational guidelines and found Plaintiff became
5 disabled as of reaching age 55. Tr. 1011.

6 The ALJ thus concluded Plaintiff's substance use disorder was a
7 contributing factor material to the determination of disability prior to age 55, and
8 thus Plaintiff was not under a disability within the meaning of the Social Security
9 Act prior to February 2, 2020, but that he became disabled on that date. Tr. 1011-
10 12.

11 ISSUES

12 The question presented is whether substantial evidence supports the ALJ's
13 decision denying benefits and, if so, whether that decision is based on proper legal
14 standards.

15 Plaintiff contends the ALJ erred by (1) finding Plaintiff's conditions did not
16 meet or equal a listing absent substance use; (2) improperly evaluating medical
17 opinion evidence; and (3) improperly rejecting Plaintiff's symptom testimony.

18 DISCUSSION

19 1. Plaintiff's subjective complaints

20 Plaintiff contends the ALJ erred by improperly rejecting his subjective
21 complaints. ECF No. 16 at 17-20.

22 It is the province of the ALJ to make credibility determinations. *Andrews v.*
23 *Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). However, the ALJ's findings must be
24 supported by specific, cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231
25 (9th Cir. 1990). Once the claimant produces medical evidence of an underlying
26 medical impairment, the ALJ may not discredit testimony as to the severity of an
27 impairment merely because it is unsupported by medical evidence. *Reddick v.*
28 *Chater*, 157 F.3d 715, 722 (9th Cir. 1998). Absent affirmative evidence of

1 malingering, the ALJ's reasons for rejecting the claimant's testimony must be
2 "specific, clear and convincing." *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir.
3 1996); *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1996). "General findings are
4 insufficient: rather the ALJ must identify what testimony is not credible and what
5 evidence undermines the claimant's complaints." *Lester*, 81 F.3d at 834; *Dodrill v.*
6 *Shalala*, 12 F.3d 915, 918 (9th Cir. 1993).

7 The ALJ concluded Plaintiff's medically determinable impairments could
8 reasonably be expected to cause the alleged symptoms; however, Plaintiff's
9 statements concerning the intensity, persistence and limiting effects of those
10 symptoms were not fully supported prior to the established onset date. Tr. 996.
11 Specifically, the ALJ found the objective medical and mental evidence did not
12 support the extent of Plaintiff's allegations and found that Plaintiff had engaged in
13 a somewhat normal level of daily activity and interaction, contrary to his
14 allegations. Tr. 996-1000.

15 A claimant's daily activities may support an adverse credibility finding if the
16 claimant's activities contradict their other testimony or if the claimant can spend a
17 substantial part of the day engaged in functions transferable to a work setting. *Orn*
18 *v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007). However, Ninth Circuit caselaw has
19 been clear that the Social Security Act "does not require that claimants be utterly
20 incapacitated to be eligible for benefits, and many home activities may not be
21 easily transferable to a work environment where it might be impossible to rest
22 periodically or take medication." *Smolen v. Chater*, 80 F.3d 1273, 1287 n.7 (9th
23 Cir. 1996). The Ninth Circuit has further stated:

24 We have repeatedly warned that ALJs must be especially cautious in
25 concluding that daily activities are inconsistent with testimony about
26 pain, because impairments that would unquestionably preclude work
27 and all the pressures of a workplace environment will often be
28 consistent with doing more than merely resting in bed all day.

1 *Garrison v. Colvin*, 759 F.3d 995, 1016 (9th Cir. 2014).

2 The ALJ noted Plaintiff engaged in activities such as tending to personal
3 care, doing household chores, jogging and riding a bicycle, doing volunteer work,
4 chairing AA meetings, and attending church. Tr. 1000. The ALJ cited to a few
5 points in the record where these activities were noted in medical records or
6 reported by Plaintiff in his function reports. *Id.* The ALJ failed to explain how any
7 of these activities were inconsistent with Plaintiff's reports or how they indicated
8 an ability for full-time work. Plaintiff never claimed an inability to tend to his own
9 personal or household care, and while he reported he preferred to be alone, he did
10 not report any difficulty getting along with others. Tr. 263-64, 647, 1035-36, 1388,
11 1396. Regarding Plaintiff working, volunteering, or exercising, the record does not
12 indicate that he did any of these things on any continuous basis or at a level
13 consistent with competitive employment. The Court finds the ALJ's discussion
14 does not constitute a clear and convincing basis for disregarding Plaintiff's
15 subjective reports.

16 The only other rationale offered by the ALJ was a summary of the treatment
17 records and the conclusion that the objective medical and mental evidence did not
18 support the extent of Plaintiff's allegations. Tr. 996-1000. However, the objective
19 evidence alone is not a sufficient basis upon which to discount a claimant's
20 subjective complaints. *See Lester*, 81 F.3d at 834 (the ALJ may not discredit the
21 claimant's testimony as to subjective symptoms merely because they are
22 unsupported by objective evidence).

23 On remand the ALJ will reconsider Plaintiff's subjective reports.

24 **2. Opinion evidence**

25 Plaintiff argues the ALJ erred in evaluating the medical opinion evidence,
26 specifically pointing to the ALJ's weighing of Drs. Genthe, Bowes, Dougherty,
27 Crank, and Jackson, and ARNP Wheeler. ECF No. 16 at 7-17.

1
2 ***a. Dr. Genthe***

3 When an examining physician's opinion is contradicted by another
4 physician, the ALJ must offer "specific and legitimate" reasons to reject the
5 opinion. *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1995). The specific and
6 legitimate standard can be met by the ALJ setting out a detailed and thorough
7 summary of the facts and conflicting clinical evidence, stating their interpretation
8 thereof, and making findings. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir.
9 1989).

10 ***i. 2014 opinion***

11 Plaintiff attended two consultative exams with Dr. Genthe, one in 2014 and
12 one in 2019. In 2014, Dr. Genthe diagnosed Plaintiff with major depressive
13 disorder with anxious distress and methamphetamine and alcohol use disorders. Tr.
14 587. He opined Plaintiff had multiple mild and moderate limitations and was
15 markedly impaired in his ability to perform activities within a schedule, maintain
16 regular attendance, be punctual within customary tolerances, and communicate and
17 perform effectively in a work setting. Tr. 587. He opined the current limitations
18 were not primarily the result of alcohol or drug use within the past 60 days. Tr.
19 588. In his concluding notes, he wrote that "based on [Plaintiff's] long standing
20 substance abuse history, he will likely require a significant period of time to be
21 effective in his everyday functioning, which would include maintaining a job and
22 dealing with everyday stressors." *Id.* Dr. Genthe further noted Plaintiff was
23 "unlikely to function adequately in a work setting until his psychological
24 symptoms have been managed more effectively." *Id.*

25 The ALJ summarized this opinion and gave it partial weight. Tr. 1004-05.
26 He reasoned that since Plaintiff reported being five weeks sober as of the time of
27 the exam, Dr. Genthe's opinion that Plaintiff would need a significant period of
28 abstinence to effectively maintain a job was not supported by the largely normal

1 findings on the mental status exam. Tr. 1004. The ALJ further found the opinion
2 was not consistent with Plaintiff's daily activities or other mental status findings
3 during periods of sobriety. Tr. 1004-05.

4 Plaintiff argues the ALJ improperly conflated Plaintiff's abilities on a brief
5 exam with sustaining such abilities during a full-time job. ECF No. 16 at 9.
6 Defendant argues the ALJ reasonably found the assessed limitations to be
7 inconsistent with the normal exam findings and other evidence in the record. ECF
8 No. 17 at 11-12.

9 The Court finds the ALJ's analysis is insufficient. Doctor Genthe
10 commented on Plaintiff's ability to sustain activities over a normal workday and
11 workweek on an ongoing basis. Tr. 587. The ALJ did not identify any evidence
12 that is contrary to Dr. Genthe's opinion. While Plaintiff may have demonstrated
13 some improvement in his immediate functional abilities during brief periods of
14 sobriety, there is no evidence of his ever having sustained sobriety for a significant
15 period of time the way Dr. Genthe opined would be necessary in order for Plaintiff
16 to effectively maintain a job. Furthermore, the ALJ failed to acknowledge Dr.
17 Genthe's statement that the impairments were not primarily the result of alcohol or
18 drug use within the past 60 days. Tr. 1004. Additionally, similar to the discussion
19 above, none of the identified activities demonstrate an ability to perform full-time
20 work, and none are inconsistent with Dr. Genthe's opinion, which related to
21 Plaintiff's capacity for various activities in a full-time work environment.
22 Therefore, the Court finds the ALJ failed to provide specific and legitimate reasons
23 for discounting Dr. Genthe's 2014 opinion.

24 *ii. 2019 opinion*

25 Plaintiff attended a second consultative exam with Dr. Genthe in 2019. Tr.
26 1386-93. Doctor Genthe diagnosed Plaintiff with major depressive disorder,
27 schizophrenia, mild marijuana use disorder, and moderate methamphetamine use
28 disorder. Tr. 1389. He assessed a number of mild and moderate limitations and

1 found Plaintiff to be markedly impaired in asking simple questions or requesting
2 assistance, and severely impaired in communicating and performing effectively,
3 maintaining appropriate behavior, and completing a normal workday or workweek
4 without interruptions from psychologically based symptoms. Tr. 1390. Doctor
5 Genthe opined that the limitations were not primarily the result of a substance use
6 disorder. Tr. 1391.

7 The ALJ gave this opinion substantial weight as it related to periods of
8 substance use, noting Plaintiff's report of daily marijuana and methamphetamine
9 abuse, and found the abnormal mental status exam results to be consistent with
10 similar findings and symptoms during periods of substance use. Tr. 1004-05.

11 Plaintiff argues the ALJ erred by ignoring Dr. Genthe's statement that the
12 limits identified were not primarily the result of substance abuse, and in finding the
13 opinion to only be consistent with periods of substance abuse. ECF No. 16 at 9-10.
14 Defendant argues the ALJ reasonably concluded that the opined limits accurately
15 reflected Plaintiff's functioning when he was using substances and reasonably
16 drew conclusions based on the record as a whole. ECF No. 17 at 13.

17 The Court finds the ALJ's discussion is insufficient. While the ALJ noted
18 consistent information in the record from periods of substance use, the ALJ failed
19 to acknowledge Dr. Genthe's opinion that the limitations were not primarily the
20 result of substance use. This is a material element of Dr. Genthe's opinion that the
21 ALJ failed to address or offer any reasons for discounting. On remand, the ALJ
22 will reconsider Dr. Genthe's opinion.

23 ***b. Remaining opinions***

24 Plaintiff also challenged the ALJ's treatment of the opinions provided by Dr.
25 Bowes, Dr. Dougherty, Dr. Crank, Dr. Jackson, and ARNP Wheeler. Considering
26 the case is being remanded for the ALJ to readdress Plaintiff's subjective
27 statements and the opinion from Dr. Genthe, the ALJ will also address the
28 remaining opinions on remand.

1 **3. Step 3 findings**

2 Plaintiff argues the ALJ improperly found Plaintiff's conditions would not
3 meet or equal a listing in the absence of substance use. ECF No. 16 at 5-7.

4 The Social Security Act bars payment of benefits when drug abuse or
5 alcoholism (DAA) is a contributing factor material to a disability claim. 42 U.S.C.
6 §§ 423(d)(2)(C) & 1382(a)(3)(J); *Bustamante v. Massanari*, 262 F.3d 949 (9th Cir.
7 2001). If there is evidence from an acceptable medical source that a claimant has a
8 substance abuse disorder and the claimant succeeds in proving disability, the
9 Commissioner must determine whether DAA is material to the determination of
10 disability. 20 C.F.R. § 416.935; SSR 13-2p (Feb. 20, 2013), *available at* 2013 WL
11 621536. That is, the ALJ must perform the sequential evaluation process a second
12 time, separating out the impact of the claimant's DAA, to determine if they would
13 still be found disabled if they stopped using drugs or alcohol. *Bustamante*, 262
14 F.3d at 955. DAA is a materially contributing factor if the claimant would not meet
15 the SSA's definition of disability if the claimant were not using drugs or alcohol.
16 20 C.F.R. § 416.935(b).

17 The ALJ found that Plaintiff's impairments, including substance abuse, met
18 Listings 12.04 and 12.06 based on marked impairment in each of the paragraph B
19 criteria. Tr. 991-92. He then found that if Plaintiff stopped the substance abuse, his
20 remaining conditions would not meet or equal a listing, finding mild and moderate
21 limitations in the B criteria. Tr. 993-94.

22 Plaintiff argues the ALJ failed to point to sufficient evidence demonstrating
23 Plaintiff's co-occurring mental impairments are not disabling in the absence of
24 substance abuse. ECF No. 16 at 5-7. He asserts that the record does not contain a
25 sufficient period of sustained sobriety with which to assess his functioning, and
26 argues no evidence establishes that he would not be disabled absent substance
27 abuse. *Id.* Defendant argues the ALJ cited to evidence from periods of sobriety and
28

1 reasonably concluded that Plaintiff's functional abilities improved in the absence
2 of substance use. ECF No. 17 at 3-9.

3 The Court finds the ALJ did not err. While Plaintiff has struggled with
4 substance abuse for the vast majority of his life, the ALJ did identify evidence
5 from periods of sobriety, and reasonably interpreted the evidence as showing some
6 improvement in Plaintiff's functional abilities in the various B criteria. Tr. 993-94.
7 The Court finds the ALJ's step three findings are supported by substantial
8 evidence.

9 However, as this claim is being remanded on other bases, the ALJ will re-
10 evaluate each of the steps in the sequential evaluation process, including the
11 materiality of DAA.

12 CONCLUSION

13 Plaintiff argues the decision should be reversed and remanded for the
14 payment of benefits. The Court has the discretion to remand the case for additional
15 evidence and findings or to award benefits. *Smolen v. Chater*, 80 F.3d 1273, 1292
16 (9th Cir. 1996). The Court may award benefits if the record is fully developed, and
17 further administrative proceedings would serve no useful purpose. *Id.* Remand is
18 appropriate when additional administrative proceedings could remedy defects.
19 *Rodriguez v. Bowen*, 876 F.2d 759, 763 (9th Cir. 1989). In this case, the Court
20 finds that further development is necessary for a proper determination to be made.

21 The ALJ's decision is not supported by substantial evidence. On remand, the
22 ALJ shall reevaluate Plaintiff subjective complaints and the opinions from Dr.
23 Genthe, and make findings on each of the five steps of the sequential evaluation
24 process. As the parties did not raise any challenge to the award of benefits as of
25 age 55, that finding is not disturbed.

26 Accordingly, **IT IS ORDERED:**

27 1. Plaintiff's Motion for Summary Judgment, **ECF No. 16**, is
28 **GRANTED IN PART.**

1 2. Defendant's Motion for Summary Judgment, **ECF No. 17**, is
2 **DENIED**.

3 3. The matter is **REMANDED** to the Commissioner for additional
4 proceedings consistent with this Order.

5 4. An application for attorney fees may be filed by separate motion.

6 The District Court Executive is directed to file this Order and provide a copy
7 to counsel for Plaintiff and Defendant. Judgment shall be entered for Plaintiff and
8 the file shall be **CLOSED**.

9 DATED February 9, 2022.




JAMES A. GOEKE
UNITED STATES MAGISTRATE JUDGE